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No. 34.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

RAYMOND WOOD.

MOTION OF CHARLES J. HOEPPEL AND JOHN H. HOEPPEL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICI CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May it Please the Court:

The undersigned, as counsel for Charles J. Hoeppel and John H. Hoeppel, move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

JAMES J. LAUGHLIN,
Counsel for Charles J. Hoeppel and John H. Hoeppel as Amici Curiae.

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BRIEF OF CHARLES J. HOEPPEL AND JOHN H. HOEPPEL AS AMICI CURIAE.

I.

PRELIMINARY STATEMENT.

The case of Raymond Wood, an obscure negro, is far more important and involves issues of even greater magnitude than that of another obscure negro, Dred Scott, as to which the Court is referred to its records and to history. These issues affect the right of every man, whether white, black, red, yellow or brown, to an *impartial* trial.

The particular interest which has caused the application for leave to file this brief *amicus curiae* arises from the fact that in petition for certiorari, No. 141, the same issues are raised by the appellants therein, Charles J. Hoeppel and John H. Hoeppel. While this petition was denied without

opinion on October 12, 1936, by this Court, a petition for rehearing is now in course of preparation and will be filed within the time allowed by the rules. A decision on the substantial constitutional issues in the *Wood* case would necessarily affect the same issues raised in the *Hoeppel* case.

Furthermore, in asking leave to file this brief, the movers are representative of a large class of persons who will be directly affected by a decision in the present case. According to the Washington (D. C.) "News", of March 25, 1936, page 1, Column 2, 768 indictments have been returned by grand juries containing Government employees since the Act of August 22, 1935, c. 605, 49 Stat. 682, went into effect. This does not include the large number of jury trials of those indicted before this Act became effective but tried by unconstitutional juries selected thereunder. Even though it may be too late to raise these issues on certiorari—and it is believed that this Court will await its final action on petition for rehearing in the Hoeppel case before pre-judging this question—it is entirely proper to raise such issues in *habeas corpus* proceedings, especially, as the Solicitor General denied that "there has been any *showing* that the petitioners (in the *Hoeppel* case) were tried by a jury which was in fact biased or prejudiced against them." (P. 6, U. S. brief) Of course, the court below, in the *Wood* case, and this Court in the *Crawford* case, held such a showing unnecessary.

The present Chief Justice of this Court has suggested weighty reasons why these issues not only affect the individuals in this nation but the nation itself and its form of government, saying:

> "With the common law, we took its distinctive feature of TRIAL BY JURY, at once a BULWARK OF FREEDOM and an effective method of applying to infinitely varied states of fact within ordinary experience the common sense of the community. But in ob-

taining the practical advantages of this method we have found what is, especially for us, a most important by-product, the advantage of which in the MAINTENANCE OF FREE INSTITUTIONS is rarely mentioned. I refer to its advantage as a means of instruction. Throughout our land, in the more than 2,500 counties in our states, our citizens are constantly sitting in grand juries and petty juries, in criminal cases, and as trial juries in civil cases, so that the qualified portion—which is very large—of our population is constantly passing in rotation through our courts receiving directions, obtaining schooling in our laws and acting as RESPONSIBLE CRITICS and valuers of assertion, testimony and argument—A PRICELESS DISCIPLINE IN DEMOCRACY.—"Pathways to Peace", page 210.

Independent of Article III and Amendment VI, the due process of law clauses of the Constitution protect trial by an IMPARTIAL jury. Mr. Justice Cardoza has stated that one of those "indispensable elements of justice" which is "essential to the attainment of due process of law" is that "there must be TRIAL BY AN *IMPARTIAL* JUDGE WITHOUT INTEREST IN THE EVENT." ("The Paradoxes of Legal Science", page 2) It is obvious that this statement applies equally whether it is a judge of fact (a juror) or a judge of law.

Reference has been made to the authorities holding that neither lack of diligence nor a waiver of the right of an *impartial* jury trial is of any importance on this fundamental question. It is only sufficient to say at this time that NO DECISION OF THIS COURT HAS EVER HELD THAT THE RIGHT TO AN *IMPARTIAL* JURY TRIAL CAN BE WAIVED.

At the least, the issues are important to the Hoeppels and those similarly situated in view of their right to apply for habeas corpus and their constitutional right to petition the President of the United States for a pardon on the ground that they were tried by a partial jury of Federal partisans in violation of their constitutional rights.

II.

ARGUMENT.

The Government brief presents precedents from the blackest days of the darkest period of the common law in an attempt to justify packing Federal juries with Federal partisans. It is sufficient to dispose of unhappy precedents from "Bloody Judge Jeffreys" and the persecution of Rowan, the Irish patriot, and others, by quoting the historian, Macauley:

> "The King was forced to remove those who thwarted him by means of perjured witnesses, PACKED JURIES and corrupt, hard-hearted, brow-beating judges. . . . The tribunals were an unclean public shambles, to which each party in its turn, dragged its opponents and where each found the same venal and ferocious butchers waiting for its custom. Papist or Protestant, Tory or Whig, Priest or Alderman, all was one to those greedy and savage natures, providing only there was money to earn or blood to shed. Of course, these worthless judges soon created around them, as was natural, a breed of informers, more wicked, if possible, than themselves." (Macauley's Works, Vol. .., page .....)

Professor Laski recalls a precedent of this period, which the Government does not cite, that "During the Irish land troubles of the last century, the empanelled special juries were almost invariably Protestant (supporters of the Government) as the prisoners were almost equally invariably Roman Catholics. One Delany, a juror, protested against the deliberate exclusion of Roman Catholics from the panel of special jurors and WAS AT ONCE FINED FOR CONTEMPT OF COURT." ("Studies in Law and Politics", page 3) It seems that the Government should therefore cite counsel for contempt for protesting against packing of their juries with partisans and employees of the Government.

Just before his death, Judge Crane, of the New York Court of Appeals, well said: "THE JURY IS THE LAST VESTIGE OF PURE DEMOCRACY THAT REMAINS."

While a member of the same court, Mr. Justice Cardoza intimated that even Government employees, pensioners, contractors, and others, might have at least an unconscious bias in favor of the Government from which they receive their livelihood, saying: "Deep below consciousness are . . . the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." ("The Nature of the Judicial Process", pp. 167-8)

This Court has held that the "constitution should be read in the light of its history and of the understanding of the whole American people when the grant was made," (*Gibbons* v. *Ogden,* 9 Wheat. 1) and not in the dim light of the darkest shadows of the common law.

The first and only definition of the right to jury trial in American history was that of the first Continental Congress, October 26, 1774, in an address to the "inhabitants of Quebec," which specified that jurors must be "unexceptionable" (*i. e.,* impartial). The Declaration of Independence charged King George III with "Depriving us in many cases of the BENEFITS of trial by jury."

This Court well said in *Ex. p. Milligan,* 4 Wall. 123: ". . . that when the original Constitution was proposed for adoption it encountered severe opposition and but for the belief that it would be so amended as to embrace them (trial by jury and trial in vicinage) it (the Constitution) would never have been adopted." That is why Article III, providing for trial by jury in criminal cases, was changed by Amendment VI to require trial by an "IMPARTIAL jury."

The "opposition" referred to by this Court in the Milligan case has been preserved in many cases by the constitutional debates. Patrick Henry pointed out the danger of permitting trial of citizens of the states in the District of Columbia, the "ten miles square", claiming trials would be dominated by partisans of the Federal government and of the Administration, and while the reporter did not get his complete remarks, John Marshall preserved part indirectly by his reply before the Virginia constitutional convention:

> "I hope that in this country, where IMPARTIALITY is so much admired, the laws will direct facts to be ascertained by a jury. But, says the honorable gentleman (Patrick Henry), THE JURIES IN THE TEN MILES SQUARE WILL BE MERE TOOLS OF PARTIES . . . Because the government may have a district ten miles square, will no man stay there but the tools and officers of the government? . . . Will there not be independent merchants, and respectable gentlemen of fortune, within the ten miles square? Will there not be worthy farmers and mechanics?"

Washington has since grown from a few hundred population to 600,000, yet, after 148 years, we find the dissenting judge in the *Wood* case and the Solicitor General of the United States actually proposing to allow 100,000 government employes and other government partisans to sit in cases in which the government is a party. Furthermore, nearly all of the 100,000, due to the classified civil service apportioning these positions among residents of the states, and politicians seeing to it that the others are nearly all residents and voters of their states, *are not even legal residents of this jurisdiction in which they temporarily sojourn,* and could not serve as jurors.

THE REAL ISSUE IS WHETHER THE FEDERAL GOVERNMENT CAN PACK JURIES WITH FEDERAL PARTISANS IN CASES IN WHICH IT IS A PARTY.

The Court of Appeals, in its decision in the *Wood* case, recognized and gave effect to the Sixth Amendment to the Constitution, which provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury." The Opinion quotes the language of the statute which is held to be unconstitutional and reviews, at length, both common law and Federal decisions, and then lays down the correct rule with respect to requiring impartial jurors, saying:

> "Indeed, the rule is that a very small or insignificant interest in the result of the trial is sufficient to disqualify a person from sitting as a juror. In short, wherever there appears to be any self-interest, that fact provides an absolute disqualification. The rule but recognizes the unalterable fact that our human nature inevitably looks with favor upon the side that supplies the means of existence. And it would seem, in fairness, that the rule should and ought to apply equally to an employee of the United States. But we have no need to rely upon our own views, or to set them forth at any length, for the Supreme Court in the *Crawford* case has foreclosed all doubt on that subject."

The Court quotes from Crawford v. United States, 212 U. S. 183, holding Federal employees cannot sit on juries where their employer, the United States, is a party:

> "A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such *relation to* either side as to lead on that account to any doubt on that subject."

The relation of Crawford, a druggist, to the United States in that case was in the joint nature of employee and contractor, as he received $300 a year to serve as postal clerk and for rent of a postal sub-station in his drug store.

Contractural relationship also disqualifies as is shown in *Quay* v. *Duluth Ry. Co.*, 116 N. W. 1001, 18 L. R. A. N. S. 250.

There is no difference in principle between the constitutional requirement of an impartial jury and the constitutional requirement of an impartial judge being necessary as due process of law. The Court has upheld the necessity of judges being impartial in a number of cases.

Berger v. United States, 255 U. S. 22, 36;
Tumey v. Ohio, 273 U. S. 510;
Cf. 2 Cooley, Constitutional Limitations, 8th ed. 870, 873, 874;
Quercia v. United States, 289 U. S. 469.

Cooley, supra, illustrates the main questions involved because he points out that (1) Coke doubted whether even Parliament could make a man judge (or juror) in his own cause even under the unlimited power of that body, and (2) that no state or Federal legislative body can do so, and (3) no person can waive a trial by an impartial judge or jury and submit to a trial by interested or disqualified persons, saying:

> "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for JURA NATURAE SUNT IMMUTABILIA, and they are LEGES LEGUM.'
>
> * * * * * *

"* * * To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.

"Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party."

A constitutional jury must be IMPARTIAL and, if it is composed of one or more disqualified and partial jurors, it is not a constitutional tribunal. If it is not a constitutional tribunal, it does not have jurisdiction and its judgment is void. It is never too late to raise a question of Federal jurisdiction in any Federal court.

The Court said in *Mitchell* v. *Maurer*, 293 U. S. 237, 244:

"Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself, not only of its own jurisdiction, but also of that of the lower courts in a cause under review. Mansfield, etc. Ry. v. Swan, 111 U. S. 379, 382."

The Court sustained this point in *Thompson* v. *Utah*, 170 U. S. 343, 353, where it said:

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that this trial by such a jury was in violation of his constitutional rights. It is sufficient to say that IT WAS NOT IN

> THE POWER OF ONE ACCUSED OF FELONY, *BY CONSENT EXPRESSLY GIVEN* OR *BY HIS SILENCE*, TO AUTHORIZE A JURY OF ONLY EIGHT PERSONS TO PASS UPON THE QUESTION OF HIS GUILT. The law in force, when this crime was committed, did not permit any TRIBUNAL to deprive him of his liberty, except one constituted of a court and a jury of twelve persons."

The Fourth Circuit Court of Appeals, in *Coates* v. *United States*, 290 Fed. 135, itself raised this point although not assigned as error, on the authority of the foregoing case and *Callan* v. *Wilson*, 127 U. S. 540, saying:

> "It is true that he *EXPRESSLY* CONSENTED TO WAIVE A JURY TRIAL and does not now seek a relief from his agreement; nevertheless, THE CONSTITUTIONAL REQUIREMENT IS MANDATORY: IT CAN NOT BE WAIVED IN ANY CASE TO WHICH IT IS APPLICABLE."

To the same effect is *Low* v. *United States*, 169 Fed. 86 (opinion by *Lurton, J.*, afterwards on this Court) where it is stated:

> "He may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court." *Dickinson* v. *United States*, 159 Fed. 801.

The Court, Justices Sutherland, Van Devanter, McReynolds and Butler, with Justice Sanford, agreeing to the disposition, held in *Patton* v. *United States*, 281 U. S. 276 (1930) that under five specified conditions a defendant could waive a jury trial so as to be tried by the judge alone and by the same conditions waive a constitutional jury of twelve and submit to a trial by less than twelve jurors. Justice Holmes, Brandeis, and Stone only concurred in "the result." The question came up in a case where the defendant

had expressly waived twelve jurors when one became sick, and agreed for the trial to continue before eleven jurors.

THE *PATTON* CASE DID NOT HOLD THAT A JURY OF *DISQUALIFIED* AND *PARTIAL* JURORS COULD BE WAIVED, AND VALID CONSENT TO TRIAL THEREBY BE GIVEN. It correctly holds that the Sixth Amendment protects not the mere form of jury trial but "any of the *essential* elements thereof." The main essential element is that it must be "impartial." This court has never held that any citizen can waive under any circumstances, however specific, the constitutional requirement of an "impartial" jury. The law requires the judge to be impartial and it must be an impartial jury, even if less than twelve in number.

The only case in which this Court ever held that any essential element of a constitutional jury trial could be waived is the 1930 case of *Patton* v. *United States,* supra.

Unless the case comes within the conditions of waiver set out in that case, no waiver can be held to exist. While we believe that no waiver of "impartiality" can ever be upheld by a Federal Court, it is sufficient in this case to prove that there was no compliance with any one of the five specified conditions set out in the *Patton* case as absolutely necessary in order that a valid waiver of an essential element of constitutional jury trial may be proven.

The first condition is the "consent of government counsel" to the waiver and the "sanction of the court" is the next. Neither was given nor asked, as the matter was not mentioned at the voir dire examination. The third condition is that the "express" consent of the defendants be given, which cannot be shown because the question was not raised. The same is true of the fourth requirement of an "intelligent consent" of the defendants. They could not expressly and intelligently consent to something about which they knew nothing. It is plain that the Court considers a waiver of any element of a constitutional jury

trial to be too important to be implied from conduct or silence. The fifth requirement to a valid waiver is that the judge must perform his duty before giving his sanction to a waiver of a constitutional jury not "as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from *any of the essential elements thereof.*"

Where the right to a constitutional trial by jury is involved, a Federal appellate court will raise the question of its own motion, as illustrated by *Coates* v. *United States, supra,* and *Thompson* v. *Utah, supra.* However, the power to notice plain error in a federal appeal is settled, *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 480, and the appellate federal courts are required to do so under *Judicial Code, Sec. 269* (U. S. C. A., T. 28, Sec. 391).

In the *Wood* case, supra, the Court of Appeals said the disqualified jurors "represented nearly half the panel. In other cases, they might well represent the whole. It is not enough to say that they might discharge their duties fairly to the accused." The Court of Appeals thus had judicial notice from its own records that this class of disqualified jurors were serving at the time of petitioners' trial. Furthermore, there was a presumption, made overwhelming by judicial notice and common knowledge, that said statute allowing disqualified jurors to serve on juries was being enforced during the time of petitioners' trial. This court has indulged presumptions when necessary to protect the constitutional right to jury trial in cases such as *Neal* v. *Delaware,* 103 U. S. 370, 397, and *Norris* v. *Alabama,* 294 U. S. 587, 599.

CONCLUSION.

The Government's argument about Government employees being "Crown servants" is based on the old construction of the maxim, "The King (and his servants) can do

no wrong." The modern common law in England as to this maxim has been well stated by the present Lord Chief Justice of England, Lord Hewart of Bury, in his book, "The New Despotism", which has made a profound impression in England and America, at page 23: "The Maxim 'The King can do no wrong' imports not only that the King cannot be proceeded against for any alleged wrong, but also that HE CANNOT AUTHORIZE ANY WRONGFUL ACT so as to justify the wrongdoer.' " The same jurist, while speaking mainly of administrative decisions, says, at page 46:

> "The public official is not independent. As a civil servant, he is liable to be dismissed at any time without notice, and without any enforceable right to compensation. One would have thought it perfectly obvious that no one employed in an administrative capacity ought to be entrusted with judicial duties in matters connected with his administrative duties. THE RESPECTIVE DUTIES ARE INCOMPATIBLE. IT IS TOO MUCH TO EXPECT IN SUCH CIRCUMSTANCES THAT HE SHOULD PERFORM THE JUDICIAL DUTIES IMPARTIALLY. Even if he acts in good faith, and does his best to come to a right decision, he cannot help bringing what may be called an official or departmental mind, which is a very different thing from a judicial mind, as everybody who has had any dealings with public officials knows, to bear on the matter he has to decide. More than that, it is his duty, as an official, to obey any instructions given him by his superiors, and, in the absence of special instructions, TO FURTHER WHAT HE KNOWS TO BE THE POLICY OF HIS DEPARTMENT. HIS POSITION MAKES IT INEVITABLE THAT HE SHOULD BE SUBJECT TO POLITICAL INFLUENCES."

In conclusion, counsel *amici curiae* respectfully submit that the decision in the *Wood* case below should be sustained in even stronger language and reasoning than that in the opinion below and that its decision be applied to all cases,

including the *Hoeppel* case, at this term of court and hereafter.

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